

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

THE CITY OF NEW YORK

Plaintiff,

v.

OLD DOMINION TOBACCO COMPANY,  
INCORPORATED d/b/a ATLANTIC  
DOMINION DISTRIBUTORS,

Defendant.

Case No. 1:20-cv-05965

**AFFIDAVIT OF KEVIN K. BARNEY  
IN SUPPORT OF MOTION TO  
DISMISS**

I, Kevin K. Barney, as the Executive Vice President of Sales and Marketing of Old Dominion Tobacco Company, Inc., submit the following affidavit and testify as follows:

1. I am over the age of eighteen and competent to testify.
2. I have held the position of Executive Vice President of Sales and Marketing of Old Dominion Tobacco Company, Inc. since October 1998 and have knowledge of the following facts.
3. Old Dominion Tobacco Company, Inc. is a corporation organized under the laws of the Commonwealth of Virginia, with its principal place of business in Virginia Beach, Virginia, and does business under the name Atlantic Dominion Distributors (“Atlantic Dominion”).
4. Atlantic Dominion is a wholesale distributor of tobacco and other products.
5. Atlantic Dominion is licensed to sell tobacco products, including cigarettes, to retailers in Virginia, West Virginia, North Carolina, South Carolina, Georgia, Tennessee, Pennsylvania, Ohio, and Maryland.
6. Atlantic Dominion is required to affix the appropriate tax stamp to each carton of cigarettes based upon the location of the cigarette retailer to which the cigarettes are being sold.

7. In Virginia, this includes a state tax stamp and, where applicable, stamps reflecting taxes imposed by cities and towns.

8. Atlantic Dominion takes great care to ensure that all of the cigarettes it sells to retailers are properly tax stamped.

9. Atlantic Dominion does not sell cigarettes to retailers located in New York.

10. Atlantic Dominion does not have an office in New York.

11. Atlantic Dominion does not own real property in New York.

12. Among other products, Atlantic Dominion sells retailers cigarettes manufactured by Philip Morris USA (“Philip Morris”).

13. Philip Morris designates certain wholesalers as having “direct purchasing status.”

14. Atlantic Dominion has direct purchasing status with Philip Morris.

15. Direct purchasing status allows designated wholesalers to purchase Philip Morris tobacco products at prices that are standard among the designated wholesalers.

16. Direct purchasing status thus allows a wholesaler to purchase Philip Morris tobacco products at prices that allow it to be competitive with other designated wholesalers.

17. Philip Morris requires all wholesalers with direct purchasing status to sign the Philip Morris USA Inc. Wholesale Leaders 2016 Program Participation Agreement (the “Agreement”), a copy of which is attached as Exhibit A.

18. Under the Agreement, participating wholesalers report sales data to Philip Morris.

19. Philip Morris, in turn, generates reports for the participating wholesalers.

20. An example of the email accompanying these reports is attached as Exhibit B.

21. One of these reports tracks the number of cartons of Philip Morris cigarettes sold by the wholesaler to each retailer.

22. Each quarter, participating wholesalers are entitled to receive funds from Philip Morris to be used for marketing purposes in connection with their sales to retailers.

23. The funds received by participating wholesalers is based on its volume of sales to each retailer, except that the funds for marketing purposes are capped at 10,400 cartons sold per retailer per quarter. Participating wholesalers do not receive marketing money for sales in excess of 10,400 cartons purchased by a retailer in a quarter.

24. Once a retailer has purchased a total of 8,000 cartons of Philip Morris cigarettes in a quarter, from all participating wholesalers, Philip Morris includes the retailer and its purchase volume in a weekly report distributed to all participating wholesalers.

25. This allows participating wholesalers to ascertain whether sales to a particular retailer will qualify for the Philip Morris marketing money incentive.

26. This process is repeated each quarter. That means that sales to a retailer whose purchases exceeded 10,400 cartons of Philip Morris cigarettes in one quarter are still eligible for marketing money incentives the next quarter (up to a sales volume of 10,400 cartons of cigarettes).

27. Philip Morris has never indicated to Atlantic Dominion that it believed that any retailer included on the weekly reports distributed to all participating wholesalers was engaged in the trafficking of cigarettes.

28. In addition to the weekly report discussed above, Philip Morris also provides a quarterly report regarding retailers it considers "Non-Eligible Customers".

29. The Non-Eligible Customers report is separate from the weekly report tracking volume.

30. Philip Morris does not prohibit sales to Non-Eligible Customers. Per the Agreement, however, at least 85% of a wholesaler's Philip Morris cigarette sales must be to

eligible customers in order to maintain its direct purchasing status. Philip Morris does not provide the same financial incentives for sales to Non-Eligible Customers as it does to eligible customers.

31. Philip Morris does not indicate in its quarterly eligibility reports why a retailer has been categorized as a Non-Eligible Customer. Nor does Philip Morris otherwise inform Atlantic Dominion why it has categorized any individual retailer as a Non-Eligible Customer.

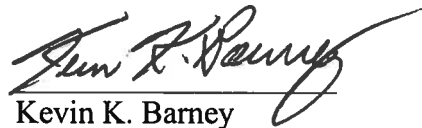
32. As a rule, Atlantic Dominion does not sell Philip Morris cigarettes to retailers identified by Philip Morris as Non-Eligible Customers.


33. Atlantic Dominion has identified a single customer to whom it has sold a small volume of cigarettes (a total of a few hundred cartons) after it was identified as a Non-Eligible Customers. This customer is not located in Spotsylvania County.

34. In fact, no Spotsylvania County retailer to which Atlantic Dominion sells cigarettes has ever been included by Philip Morris on its quarterly list of Non-Eligible Customers.

35. Philip Morris has never indicated to Atlantic Dominion that it believed any retailer located in Spotsylvania County to which Atlantic Dominion sells cigarettes was engaged in the trafficking of cigarettes.

Dated this 22 day of February, 2021.

  
Kevin K. Barney

  
Notary

